In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1581

RAYMOND ALFRED BEAUDINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted on one count of federal credit fraud (18 U.S.C. 1006) after a jury trial in the Middle District of Florida and sentenced to five years' imprisonment. The conviction was affirmed, 414 F. 2d 397 (Pet. App. A5-A16), and certiorari was denied, 397 U.S. 987.

Petitioner thereafter filed the present motion to vacate under 28 U.S.C. 2255, claiming denial of speedy trial and conviction of an offense not charged

in the indictment. The motion was denied without an evidentiary hearing[1] or opinion by the district court (Pet. App. A1). The court of appeals affirmed *per curiam* without opinion (Pet. App. A2-A4).

The chronology of events leading up to petitioner's present conviction is as follows:

November 17, 1961—First indictment filed.

August 10, 1962—Case removed from docket and reset for trial at later date.

April 30, 1963—First indictment dismissed because of superseding indictment returned April 24, 1963.

May 4, 1965—Petitioner's motion for continuance denied.

May 6, 1965—Petitioner convicted.

November 17, 1966—Conviction reversed.

February 21, 1967—Second trial ended in mistrial.

March 13, 1967—Petitioner's motion for continuance, filed March 9, 1967, denied.

March 28, 1967—Petitioner's motion to dismiss indictment, on grounds of exhaustion of physical and financial resources, harrassment and violation of due process by six-year delay from first indictment, denied.

May 2, 1967—Petitioner's motion for continuance, filed May 1, 1967, granted.

June 8, 1967—Petitioner convicted.

1. Petitioner's primary contention is that his motion to vacate on grounds of denial of the right to a speedy trial should not have been dismissed without an evidentiary hearing. A hearing was not required,

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[1] Petitioner was, however, twice heard in argument.

however, since "the files and records of the case conclusively show[ed]" that petitioner was "entitled to no relief." 28 U.S.C. 2255. Although the district judge filed no opinion, his stated reason for denying the motion without an evidentiary hearing was that petitioner had already been afforded one hearing on this issue (on March 28, 1967), and the record showed that he was entitled to no relief (Pet. 9). In these circumstances, the district judge was not required to afford petitioner a second hearing, particularly since the delay following the first hearing was occasioned by petitioner's request for a continuance. *Kaufman* v. *United States*, 394 U.S. 217, 227, n 8.

Moreover, the docket discloses that petitioner at no time demanded a speedy trial, although he was free on bail and represented by retained counsel. On the contrary, on three different occasions he moved for continuances. In these circumstances, petitioner's right to a speedy trial was not denied. See, *e.g.*, *United States* v. *Persico*, 425 F. 2d 1375, 1384-1385 (C.A. 2), certiorari denied, 400 U.S. 869; *Bandy* v. *United States*, 408 F. 2d 518, 522 (C.A. 8). Compare *Dickey* v. *Florida*, 398 U.S. 30, 32-33.

2. Petitioner also contends that since the indictment charged that he acted with "intent to injure and defraud," he was improperly convicted because no intent to injure was shown. However, intent to injure is not an element of the offense under 18 U.S.C. 1006, and these words were therefore properly ignored as surplusage. *Ford* v. *United States*, 273 U.S. 593, 602; *Gawne* v. *United States*, 409 F. 2d

1399, 1403 (C.A. 9), certiorari denied, 397 U.S. 943; *United States* v. *Harvey*, 428 F. 2d 782 (C.A. 9).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1971.

[2] The court of appeals, in its opinion on direct appeal, pointed out that the intent issue had been fully discussed and clarified by the court in reversing petitioner's first conviction. No further, unresolved questions regarding intent are presented by petitioner's Section 2255 motion. 414 F. 2d 397, 399 (Pet. App. A-8).

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